

United States v. Goble, No. 01-30427

JAN 24 2003

THOMAS, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON
U.S. COURT OF APPEALS

Given the government's proper concession that it failed to offer sufficient proof to justify a sentence enhancement pursuant to U.S.S.G. § 2D1.1(b)(5), I agree that the sentence must be vacated and the case remanded for re-sentencing.

But I respectfully dissent from the conclusion that the initial interaction between Goble and the law enforcement officers was a purely voluntary encounter rather than an investigatory stop. The government has conceded that it had no legal basis to stop Goble. Thus, the determinative question is whether Goble's first interaction with the officer was a voluntary encounter or an impermissible investigatory stop. I believe that the encounter constituted an impermissible investigatory stop.

"Questioning by law enforcement officers constitutes an investigatory stop only if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Kim, 25 F.3d 1426, 1430 (9th Cir. 1994) (citations and internal quotation marks omitted). The facts of Goble's first encounter with the police do not suggest that a "reasonable person would have believed that he was [] free to leave." Id. Goble had been followed by an officer for several miles when he pulled into a convenience store. Soon after entering the store's parking lot, Goble's mobile

home was surrounded by four marked police cruisers, which impeded and probably blocked his egress, and by four uniformed officers, one of whom positioned himself behind Goble's vehicle. Under these facts, I do not believe that a reasonable person would have felt "free to leave." Because Goble had "no reasonable alternative except an encounter with the police," the interaction must be characterized as an investigatory stop. United States v. Kerr, 817 F.2d 1384, 1386 (1987). As such, the encounter was involuntary, and the subsequent search of the motor home violated the Fourth Amendment. Therefore, I respectfully dissent from the majority's contrary conclusion.